## LABUAN FERRY CORPORATION SDN BHD v. CHIN MUI KIEN (TRADING UNDER THE NAME AND STYLE OF ECON FOCUS ENTERPRISE) & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEALS NO: S-02(W)-35-01-2016, S-02(W)-34-01-2016 & S-02(W)-115-01-2016]
18 MAY 2017

***CIVIL PROCEDURE:*** *Civil Law Act 1956 – Section 3(1) – Applicability of common law principle – Doctrine of prime necessity – Whether applies in Malaysia – Charges for use of ferry services unilaterally increased by provider of services – Complaint by owners/operators met with denial of ferry services by provider – Whether provider abused power as sole operator having monopoly over ferry services – Whether provider under duty to act in public interest*

***CONTRACT:*** *Breach – Performance of contract – Inducement – Inducement leading to breach of contract – Claim for damages – Whether sole operator and monopoly of ferry services abused power – Whether sole operator having monopoly over ferry services induced breach of contract entered into by claimant and another company*

Three appeals stemmed from two suits which were jointly tried at the High Court. By virtue of a licence granted by the Sabah Government, the appellant from the first appeal ('Labuan Ferry') became the sole operator and monopoly of the ferry services between Sabah and Labuan until the middle of 2012. The respondents in the first appeal ('the respondents') and the appellant in the third appeal ('Wong'), the owners/operators of lorries/trailers that transported goods between Sabah and Labuan, complained that Labuan Ferry unilaterally and unlawfully increased the charges for the use of ferry services between the two points. As a result of the respondents' complaints, which were publicised by the media, Labuan Ferry denied the respondents the use of the ferry services. Consequently, the respondents could not deliver goods and services to their clients; had four of their vehicles stranded in Labuan for many months; and totally lost the usage of these vehicles during the said period. The respondents and Wong commenced actions at the High Court, claiming for the refund of extra charges in the sum of RM133,990 and RM1,250,860 that Labuan Ferry imposed on them for the use of its ferry service. According to the respondents, by reason of monopoly and under the doctrine of prime necessity, Labuan Ferry was under a duty to act in the public interest to serve all without discrimination, without unreasonable exclusion and at reasonable prices. The issues that arose for the High Court's adjudication were (i) whether the common law

doctrine of prime necessity applies in Malaysia; (ii) whether Labuan Ferry was the sole provider of the essential services and if yes, whether it was required to charge a reasonable price for the services provided; and (iii) whether Labuan Ferry had interfered with the performance of Wong's contract with another company. At the conclusion of the trial, the High Court Judge ('HCJ') decided the first and second issues in favour of the respondents and dismissed Wong's claim which concerned the third issue. Hence, the present appeals. In (i) the first appeal, Labuan Ferry argued that the common law doctrine of prime necessity has no place in Malaysia as there are, in existence, written laws that govern the respondents' claim, namely the Contracts Act 1950, the Competition Act 2010 and the Merchant Shipping Ordinance 1952 ('the three statutes'); (ii) the second appeal, the appellant ('Chin') appealed against the order for damages and costs; and (iii) the third appeal, Wong appealed against the dismissal of his claim for damages against Labuan Ferry for causing breach of his contract with another company.

**Held (dismissing first and third appeals; allowing second appeal in part) Per Abdul Rahman Sebli JCA delivering the judgment of the court:**

**(1)** The mere existence of the three statutes was not key to determining whether the common law doctrine of prime necessity applied in Malaysia. The key to determining the issue was whether the three statutes encapsulated the common law doctrine of prime necessity. Presently, there is no statute in Malaysia that deals with the cause of action of the nature filed by the respondents. The three statutes do not contain provisions that regulate the monopoly of essential services such as the ferry service provided by Labuan Ferry to the general public in Sabah and Labuan. The three statues were not 'other provision has been made or may hereafter be made by any written law in force in Malaysia' within the meaning of s. 3(1) of the Civil Law Act 1956. As such, they do not have the effect of excluding the application of the common law doctrine of prime necessity. Resort was therefore in the common law doctrine of necessity (paras 52, 57 & 64)

**(2)** The HCJ erred in dismissing Chin's prayer for damages to be assessed on the ground that she produced no evidence. Since Chin's prayer was for damages to be assessed, the proper course for HCJ to take would have been to proceed with the assessment of damages in order for Chin to adduce evidence to prove the quantum of damages which she claimed to have suffered. The question as to whether damages has been proved, and if so, how much has been proved, should only be determined in an assessment proceeding upon proof of liability at the conclusion of the trial, which the appellant had succeeded in this appeal. The matter was reverted to the High Court for assessment of damages by another judge of the High Court. (paras 77 & 78)

**(3)** The HCJ had not erred, either in law or on the facts, in dealing with Wong's claim. There was no justification to override His Lordship's decision on liability. Both Wong and Chin also appealed against the HCJ's order on costs. Likewise, there was no justification to interfere with the order as it had not been shown that the HCJ had exercised his discretion wrongly. (paras 81 & 82)

***Bahasa Malaysia*** *Headnotes*

Tiga rayuan berbangkit daripada dua guaman yang dibicarakan bersekali di Mahkamah Tinggi. Melalui lesen yang diberi oleh Kerajaan Negeri Sabah, perayu dalam rayuan pertama ('Labuan Ferry') menjadi pengendali dan pemonopoli tunggal perkhidmatan feri antara Sabah dan Labuan hingga pertengahan 2012. Responden-responden dalam rayuan pertama ('responden-responden') dan perayu dalam rayuan ketiga ('Wong'), pemilik/pengendali lori-lori/treler-treler yang mengangkut barang-barang antara Sabah dan Labuan, mengadu bahawa Labuan Ferry, secara sepihak dan tidak sah, meningkatkan caj penggunaan perkhidmatan feri antara dua tempat ini. Susulan aduan responden-responden, yang dihebahkan oleh media, Labuan Ferry menafikan responden-responden akan penggunaan perkhidmatan ferinya. Akibatnya, responden-responden tidak dapat menghantar barang-barang dan gagal memberi perkhidmatan kepada pelanggan-pelanggannya; mempunyai empat kenderaan yang terkandas di Labuan beberapa bulan lamanya; dan hilang penggunaan kenderaan-kenderaan ini sama sekali bagi tempoh tersebut. Responden-responden dan Wong memulakan tindakan-tindakan di Mahkamah Tinggi, menuntut pemulangan caj tambahan berjumlah RM133,990 dan RM1,250,860 yang Labuan Ferry kenakan atas mereka bagi penggunaan perkhidmatan ferinya. Menurut responden-responden, atas alasan monopoli dan bawah doktrin keperluan utama, Labuan Ferry bertanggungjawab bertindak berdasarkan kepentingan awam untuk berkhidmat tanpa diskriminasi, tanpa penyisihan tidak munasabah dan mengenakan harga-harga munasabah. Isu-isu yang berbangkit bagi pertimbangan Mahkamah Tinggi adalah (i) sama ada doktrin keperluan utama bawah common law terpakai di Malaysia; (ii) sama ada Labuan Ferry adalah pembekal tunggal perkhidmatan penting ini dan jika ya, sama ada Labuan Ferry perlu mengenakan harga munasabah bagi perkhidmatan-perkhidmatan yang diberi; dan (iii) sama ada Labuan Ferry telah campur tangan dalam kontrak antara Wong dan satu syarikat lain. Pada penutup perbicaraan, Hakim Mahkamah Tinggi ('HMT') memutuskan isu pertama dan kedua memihak pada responden-responden dan menolak tuntutan Wong berkenaan isu ketiga. Maka timbul rayuan-rayuan ini. Dalam (i) rayuan pertama, Labuan Ferry menghujahkan bahawa doktrin keperluan utama bawah common law tidak terpakai di Malaysia kerana wujud undang-undang bertulis yang mengawal tuntutan responden-responden, khususnya Akta

Kontrak 1950, Akta Saingan Adil 2010 dan Ordinan Perkapalan Saudagar 1952 ('tiga statut'); (ii) rayuan kedua, perayu ('Chin') merayu terhadap perintah ganti rugi dan kos; dan (iii) rayuan ketiga, Wong merayu terhadap penolakan tuntutannya terhadap Labuan Ferry bagi ganti rugi kerana menyebabkan pelanggaran kontraknya dengan satu syarikat lain.

**Diputuskan (menolak rayuan pertama dan ketiga; membenarkan sebahagian rayuan kedua)**

**Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:**

**(1)** Kewujudan tiga statut tersebut bukanlah asas untuk memutuskan sama ada doktrin kepentingan utama bawah common law terpakai di Malaysia. Asas bagi menentukan isu tersebut adalah sama ada tiga statut ini mengandungi doktrin kepentingan utama bawah common law. Kini, tiada statut di Malaysia yang menangani kausa tindakan seperti yang difailkan oleh responden-responden. Tiga statut tersebut tidak mengandungi peruntukan-peruntukan yang mengawal monopoli perkhidmatan-perkhidmatan penting seperti perkhidmatan feri yang disediakan oleh Labuan Ferry kepada orang awam di Sabah dan Labuan. Tiga statut ini bukan 'other provision has been made or may hereafter be made by any written law in force in Malaysia' dalam maksud s. 3(1) Akta Undang-Undang Sivil 1956. Ketiga-tiganya tidak mempunyai kesan pengecualian pemakaian doktrin kepentingan utama bawah common law. Oleh itu, jalan keluar terdapat dalam doktrin kepentingan utama bawah common law.

**(2)** Hakim Mahkamah Tinggi terkhilaf dalam menolak tuntutan Chin bagi taksiran ganti rugi atas alasan dia tidak mengemukakan apa-apa keterangan. Oleh kerana tuntutan Chin adalah agar ganti rugi ditaksir, HMT sepatutnya meneruskan dengan taksiran ganti rugi untuk membolehkan Chin mengemukakan keterangan untuk membuktikan kuantum kerugian yang didakwa dialami olehnya. Persoalan sama ada ganti rugi telah dibuktikan, dan jika ya, jumlah yang terbukti, hanya boleh diputuskan dalam prosiding taksiran apabila liabiliti telah dibuktikan pada penutup perbicaraan. Ini berjaya dilakukan oleh perayu dalam rayuan ini. Hal perkara ini dikembalikan ke Mahkamah Tinggi bagi taksiran ganti rugi oleh hakim lain di Mahkamah Tinggi.

**(3)** Hakim Mahkamah Tinggi tidak terkhilaf, sama ada bawah undang-undang atau berdasarkan fakta, dalam memutuskan tentang tuntutan Wong. Tiada alasan kukuh untuk menolak keputusan beliau tentang liabiliti. Wong dan Chin merayu terhadap perintah HMT tentang kos. Begitu juga, tiada justifikasi untuk campur tangan perintah tersebut kerana tidak dibuktikan bahawa HMT terkhilaf dalam menjalankan budi bicara beliau.

**Case(s) referred to:**

*Allnutt v. Inglis (1810) 12 East 527* ***(refd)***
*Birmingham Corp v. Sowsbery [1970] RTR 84* ***(refd)***
*Champion Motors (1975) Sdn Bhd v. Tina Travel & Agencies Sdn Bhd [1997] 1 CLJ Supp 111 HC* ***(refd)***
*Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC* ***(refd)***
*Hinkley v. Star City Pte Ltd (2011) 284 ALR 154* ***(refd)***
*Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors [2016] 8 CLJ 149 FC* ***(refd)***
*Krishnasamy Supramany v. Arab-Malaysian Finance Bhd [2009] 2 CLJ 853 HC* ***(refd)***
*Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC* ***(refd)***
*Minister of Justice of the Dominion of Canada v. City of Levis [1919] AC 505* ***(refd)***
*Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC* ***(refd)***
*Singapore Bus Service (1978) Ltd v. Mohd Kamal Abas & Anor [1996] 2 SLR 646* ***(refd)***
*Sky City Auckland v. Wu [2002] 3 NZLR 621* ***(refd)***
*Tribune Investment Trust, Inc v. Soosan Trading Co Ltd [2000] 3 SLR 405* ***(refd)***
*Vector Ltd v. Transpower New Zealand Ltd [1999] 3 NZLR 646* ***(refd)***
*Wong Thiam Phin v. Labuan Ferry Corporation Sdn Bhd & Another Case [2016] 1 CLJ 866 HC* ***(refd)***

**Legislation referred to:**

Civil Law Act 1956, s. 3(1)(a), (b), (c)
Competition Act 2010, ss. 2, 10(1), (2)(a), (b), 15(1), 64(1)
Interpretation Acts 1948 and 1967, s. 3

Imperial Laws Application Act 1988 [NZ], s. 5

*For the Labuan Ferry - Lawrence Thien & Chau Chin Tang; M/s Chau & Thien*
*For the Chin Mui Kien & Ors - Joan Goh; M/s Goh & Assocs*
*For the Wong Thiam Phin - PS Ranjan & Kailesh Arumugam; M/s Kailesh Aru & Co*

*[Editor's note: For the High Court judgment, please see Wong Thiam Phin v. Labuan Ferry Corporation Sdn Bhd & Another Case [2016] 1 CLJ 866 (overruled in part).]*

*Reported by Najib Tamby*

## JUDGMENT

**Abdul Rahman Sebli JCA:**

### Introduction

**[1]** These three appeals originated from two separate suits which were tried jointly in the High Court at the Federal Territory of Labuan, an island of mainland Sabah. Having heard arguments by the parties, we reserved judgment to a date to be fixed. We have now reached a unanimous decision and this is our judgment.

**[2]** The appeal by the appellant in the first appeal, namely Labuan Ferry Corporation Sdn Bhd (the defendant at the trial - after this referred to as "Labuan Ferry") was against paras. 1 and 2 of the following orders made by the High Court:

(a) Judgment be entered against the defendant for the sum of;

| | | |
|---|---|---|
| (i) first plaintiff (Chin Mui Kien) | - | RM14,760 |
| (ii) second plaintiff (S.L. Transport Sdn Bhd) | - | RM204,610 |
| (iii) third plaintiff (Lim Kian Sen and Lim Kian Wah) | - | RM95,140 |
| (iv) fourth plaintiff (Lim Kian Sen) | - | RM807,000 |
| (v) fifth plaintiff (Kasmin bin Kurdi and Zainal bin Kasmin) | - | RM60,680 |
| (vi) sixth plaintiff (S.P. Hing Seng Sdn Bhd and Ting Sieng Hing) | - | RM18,640.00 |

(b) Interest at the rate of five per centum (5%) per annum for the judgment sum as para. 1 above calculated from 6 January 2011 to the date of full settlement to be paid by the defendant to the plaintiffs.

(c) The first plaintiff's claim as follows be dismissed:

(i) Damages to be assessed for the loss of use of the vehicles bearing registration number LD811 and LD6116.

(ii) Damages to be assessed for the loss of profit of the vehicles bearing registration number LD811 and LD6116.

(iii) Costs of RM30,000 to be paid by the defendant to the plaintiffs for this suit at the High Court.

(iv) Costs of RM8,000 to be paid by the defendant to the plaintiffs for the Court of Appeal Case No. S-02(IM)-856-05-2014.

**[3]** The first order was in fact an order for Labuan Ferry to refund to the respondents the excess ferry charges that it had charged the respondents over and above the charges fixed by the State Government of Sabah.

**[4]** The appeal by Chin Mui Kien (the first plaintiff at the trial) on the other hand was against the order at para. 3(a) and (b) above whilst the appeal by Wong Thiam Phin (the plaintiff in the other suit) was against the dismissal of his claim for damages against Labuan Ferry for causing breach of his contract with a company known as Gold Coin.

**[5]** Wong Thiam Phin's grievance was that on 26 May 2011 Gold Coin terminated their contract and he suffered loss and damages as a result. His claim was for annual loss of RM1,106,213.40 calculated over a 21-month period for loss of business which amounted to RM1,935,873.45 and RM100,000 for loss of reputation and inconvenience.

**The Cross-Appeal**

**[6]** Labuan Ferry on its part cross appealed against that part of the decision of the High Court ordering it to refund the sum of RM112,670 to Wong Thiam Phin. We dismissed the cross-appeal at the commencement of the hearing and upon objection raised by Wong Thiam Phin on the ground that the cross-appeal did not relate to the subject matter of the appeal by Wong Thiam Phin: *Kabushiki Kaisha Ngu v. Leisure Farm Corporation Sdn Bhd & Ors* [2016] 8 CLJ 149; [2016] 5 MLJ 557 FC. Costs shall be borne by Labuan Ferry in the sum of RM5,000.

**The Principal Relief Sought**

**[7]** At the High Court, the principal relief sought by the respondents in the first appeal was for a declaration that the excessive charges imposed by Labuan Ferry for its ferry service between the two points, namely Labuan-Menumbok and Menumbok-Labuan were unlawful and null and void.

**Facts Of Case**

**[8]** For the facts of the case, we can do no better than to reproduce, with the necessary modifications, the headnote of the case as reported in *Wong Thiam Phin v. Labuan Ferry Corporation Sdn Bhd & Another Case* [2016] 1 CLJ 866 in addition to the facts set out by the learned trial judge in his grounds of judgment.

**[9]** The salient facts are as follows. The respondents in the first appeal and the appellant Wong Thiam Phin in the third appeal were either owners or operators of lorries and trailers who were in the business of transporting goods by sea between Sabah and Labuan.

**[10]** The claim by the respondents in the first appeal was for a refund of the extra charges in the sums of RM133,990 and RM1,250,860 that Labuan Ferry imposed on them for the use of its ferry service. As for the appellant in the third appeal, the nature of his claim against Labuan Ferry was as mentioned in paras. [4] and [5] above, which the learned trial judge dismissed.

**[11]** Labuan Ferry had, by virtue of a licence granted by the State Government of Sabah, become the sole operator and monopoly of the ferry service between Menumbok and Labuan until the middle of 2012. The ferry service operated by Labuan Ferry under the aegis of the State Government

of Sabah was the only sea link between Sabah and Labuan, which was essential to trade, commerce and transportation between Sabah and Labuan. There was no other ferry operator or any other person providing such ferry service between the two points.

**[12]** The respondents complained that in January 2011, Labuan Ferry unilaterally and unlawfully increased the charges for the use of the ferry service between the two points. The pre-existing ticket price for a 9-ton laden lorry was RM270 whereas the increased ticket price fixed by the Sabah Ministry of Finance ("MOF") for the Menumbok - Labuan route was RM1,080 per lorry and it was RM1,120 per lorry for Labuan - Menumbok.

**[13]** In April 2012, Labuan Ferry increased the charges to RM1,500 and RM1,800, depending on the types of vehicles used. As a result of complaints made by the respondents, which were publicised in the media, Labuan Ferry retaliated by denying the respondents the use of the ferry service. As a consequence of the retaliation, the respondents were unable to deliver the goods and services to their clients between the two points, had four of their vehicles stranded in Labuan for 14 months, and totally lost the use of the vehicles during that period.

**The Arguments**

**[14]** The respondents' case was that they had no alternative but to use the ferry service to carry on their business of transporting goods between Menumbok and Labuan. It was submitted that by reason of the monopoly and by virtue of the doctrine of prime necessity, Labuan Ferry was under a duty to act in the public interest to serve the public without discrimination, without reasonable exclusion, and at reasonable prices in accordance with the charges regulated by the relevant authority.

**[15]** Labuan Ferry on the other hand contended that it was not the sole appointed ferry operator for the Menumbok-Labuan-Menumbok sector and did not monopolise the ferry service between the two points and that the doctrine of prime necessity does not and is not applicable in Malaysia and there was no duty on its part to act in the public interest.

**[16]** According to the appellant, the fares of RM1,080 and RM1,120 that it charged the respondents were the right fares as these were the fares fixed by MOF. There is no dispute however that by cl. 8 of the contract executed between the appellant and the State Government of Sabah, the appellant was not allowed to increase the fares without the prior written consent of the State Government.

**[17]** While it is true that the contract expired on 26 June 2010 and was not extended due to the complaints made by the respondents, Labuan Ferry continued to operate the ferry service between the two points. It had earlier been issued with a show cause letter arising from the complaints.

**[18]** The State Government then decided to appoint two other operators to operate the ferry service between Menumbok and Labuan. These two operators were supposed to commence service from 12 January 2011 but could not do so due to licensing problems and to acquire suitable ferries to be used for the service. So Labuan Ferry continued to be the monopoly provider of the ferry service.

**[19]** Labuan Ferry contended that after its contract with the Sabah Government expired on 26 June 2010, it was not bound by the terms and conditions of the contract nor the fares fixed by MOF or any other relevant authority. It was submitted that it was at liberty to fix its own fares for the ferry service and that the increased fares of RM1,500 and RM1,800 that it charged the respondents were fair and reasonable.

**[20]** Through the testimony of its Chairman (DW1), Labuan Ferry claimed that the demand for the ferry service exceeded supply and because of this it had absolute discretion to sell or not to sell tickets and to refuse anyone from using the ferry service due to illegal or unlawful acts.

**[21]** It needs to be mentioned that although the contract between Labuan Ferry and the Sabah Government had expired, the Jabatan Pelabuhan Dan Dermaga Negeri Sabah by letter dated 1 February 2011 had reminded Labuan Ferry that the existing fares for lorries and trailers fixed by MOF were to remain.

**[22]** Labuan Ferry however alleged that the respondents had cheated ("menipu") it by declaring their vehicles as lorries instead of as trailers and by under-declaring their weights, loads and dimensions when using the ferry service. Labuan Ferry further alleged that the respondents' lorries were overloaded and exceeded 25 tons and should therefore be charged more.

**The Issues**

**[23]** Having regard to the nature of the claim and the defence raised, the issues for the High Court's determination were the following:

(i) Whether the English common law doctrine of prime necessity applies in Malaysia;

(ii) Whether Labuan Ferry was the sole provider of the essential services and if so, whether Labuan Ferry was required to charge reasonable prices for the services provided;

(iii) Whether Labuan Ferry had interfered with the performance of Wong Thiam Phin's contract with Gold Coin (the third appeal).

**The High Court Decision**

**[24]** At the conclusion of the trial, the learned trial judge decided the first and second issues in favour of the respondents in the first appeal and proceeded to make the impugned orders against Labuan Ferry. The third

issue concerns the appeal by Wong Thiam Phin in the third appeal and will be dealt with later in this judgment. The second issue obviously relates to findings of fact which no doubt involved the question of the credibility of the witnesses. The principle is trite that an appellate court is loath to interfere with such findings.

**[25]** In any event, we are of the view that on the evidence before him, the learned trial judge was perfectly entitled to make those findings of fact. This is not a case where the findings are perverse or that the learned trial judge had misapprehended the facts or had misapplied the law to the facts. Neither had the learned judge considered irrelevant factors or had ignored relevant factors in arriving at those findings of fact.

**[26]** The learned judge's evaluation and assessment of the evidence can be found at pp. 16 to 24 of the grounds of judgment (pp. 51-59 part A vol. 1 of the record of appeal). We are satisfied that there had been adequate judicial appreciation of the evidence by the learned trial judge. In the circumstances, we do not see any reason to disturb his findings.

**The Common Law Doctrine Of Prime Necessity**

**[27]** The issue that perhaps requires our closer examination is Labuan Ferry's contention that the learned trial judge was wrong in accepting the common law doctrine of prime necessity as part of the common law of Malaysia. The doctrine can be traced back to *Allnutt v. Inglis* (1810) 12 East 527, a case decided in 18th century England which concerned a monopoly of the use of a warehouse. The doctrine was laid down in the following terms:

> Every man may fix what price he pleases upon his own property or the use of it but if for a particular purpose, the public have a right to resort to his premises and make use of them, and he has a monopoly in them for that purpose, **if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms** ... it is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches ... **as long as their warehouses are the only places which can be resorted to for this purpose, they are bound to let the trade have the use of them for a reasonable hire and reward**.
>
> (emphasis added)

**[28]** The learned judge in the present appeals had held as follows:

> Based on s. 3(1) of the Civil Law Act, the authorities cited, and the facts and circumstances of this case, there is no reason why the doctrine of prime necessity should not or is not applicable or cannot be part of the common laws of this country.

**[29]** In so adopting and applying the doctrine of prime necessity as forming part of the common law of Malaysia, the learned judge relied on three authorities in addition to *Allnutt*, two from New Zealand and one from

Canada, namely (1) *Sky City Auckland v. Wu* [2002] 3 NZLR 621; (2) *Vector Ltd v. Transpower New Zealand Ltd* [1999] 3 NZLR 646; (3) *Minister of Justice of the Dominion of Canada v. City of Levis* [1919] AC 505.

**[30]** In *Sky City Auckland* it was held that a business vested with monopoly of a public privilege must in the absence of good cause in a particular case make its facilities available to all and at a reasonable price. In *Vector Ltd* the doctrine of prime necessity was admitted as part of the common law of New Zealand under s. 5 of the Imperial Laws Application Act 1988 which is similar though not identical with s. 3(1) of our Civil Law Act 1956 ("the Civil Law Act").

**[31]** In the Canadian case of *Minister of Justice of the Dominion of Canada*, the Judicial Committee of the Privy Council held that the supply of water was a matter of prime necessity and that there was an implied obligation on the part of the respondents to provide water supply in consideration for a fair and reasonable payment. This doctrine has been extended to the supply of electricity, gas and other essential services.

**[32]** Section 3(1) of the Civil Law Act which allows for the reception of the common law of England in Malaysia is couched in the following language:

> Application of U.K. common law, rules of equity and certain statutes
>
> 3. (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

**[33]** It is thus mandatory to apply the common law of England as administered or in force in England on the dates specified in s. 3(1)(a), (b), (c) of the Civil Law Act where no provision "has been made or may hereafter be made by any written law in force in Malaysia". The proviso to s. 3(1)

A comes into play if such common law of England, rules of equity and statutes of general application as applicable in England on the specified dates are applicable in Malaysia.

**[34]** As to what "common law" refers to, s. 3 of the Interpretation Acts 1948 and 1967 defines it to mean the common law of England. The doctrine
B of prime necessity as laid down in *Allnutt*, being the common law of England that was in force on the dates specified in s. 3(1)(a), (b), (c) of the Civil law Act must therefore be applied in Malaysia if no "other provision has been made or may hereafter be made by any written law in force in Malaysia". We are not aware of any change in the common law doctrine of prime
C necessity ever since *Allnutt* was decided in 1810.

**[35]** Conversely, where "other provision has been made or may hereafter be made by any written law in force in Malaysia" after the specified dates, it is not permissible to apply the common law doctrine of prime necessity in Malaysia. Clearly, the intention behind s. 3(1) of the Civil Law Act is to
D allow the reception of the common law of England only where there is no statutory provision that governs the matter in dispute, subject of course to such qualifications as local circumstances render necessary.

**[36]** The development of the common law in Malaysia after the specified
E dates is entirely in the hands of the courts: see *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57; [1990] 1 MLJ 356 where the then Supreme Court through Hashim Yeop Sani CJ (Malaya) held at p. 66:

> Section 3 of the Civil Law Act, 1956 directs the courts to apply the
F common law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after April 7, 1956 (for the states of Malaya) is entirely in the hands of the courts of this country. We cannot just accept the development of the common law of England. See also one of the majority judgments in *Government of Malaysia v. Lim Kit Siang* in [1998] 2 MLJ 12
G at 40.

**[37]** Datuk Lawrence Thien for Labuan Ferry submitted that while the common law doctrine of prime necessity may apply in countries such as England, New Zealand and Canada as part of their common law, it has no place in Malaysia as there are in existence written laws that govern the
H respondents' claim, namely the Contracts Act 1950 ("the Contracts Act"), the Competition Act 2010 ("the Competition Act") and the Merchant Shipping Ordinance 1952 ("the Merchant Shipping Ordinance") and the regulations made thereunder.

**[38]** We were told that the doctrine of prime necessity is not yet part of the
I Australian common law due to the existence of relevant legislation, amongst others, the Australian Competition Act: *Hinkley v. Star City Pte Ltd* (2011) 284 ALR 154.

**Whether Doctrine Of Prime Necessity Applicable**

**[39]** The question is whether the existence of the three statutes referred to by learned counsel excludes the application of the common law doctrine of prime necessity in Malaysia. If they do, then the doctrine as administered or in force in England on 7 April 1956 (for Peninsular Malaysia), 1 December 1951 (for Sabah) and 12 December 1949 (for Sarawak) would have no application and the learned trial judge would have been wrong to apply the common law doctrine in determining liability.

**[40]** Learned counsel relied on the following passages in the judgment of the New Zealand Court of Appeal in *Vector Ltd (supra)* to support his contention that the existence of the three statutes excludes the application of the common law doctrine of prime necessity in Malaysia:

> The common law doctrine of prime necessity, that monopoly suppliers of essential services must charge no more than a reasonable price, was part of the law of New Zealand. The doctrine gave no guidance as to how to fix prices in a modern economy with extensive legislative intervention and was best viewed as a backstop common law remedy applied in the absence of other remedies and where there were no contra-indications as to its use.
>
> The doctrine of prime necessity did not operate in relation to the transmission of bulk electricity by Transpower to Vector, being precluded by the Commerce Act. This was reinforced by the State-Owned Enterprises Act. The only price control provided for was within Part IV of the Commerce Act and was available only when the criteria in Part IV were satisfied.

**[41]** The New Zealand Court of Appeal then went on to say:

> The Commerce Act 1986 was a marked departure from earlier statutory regulatory schemes. The object as stated in the long title is to promote competition in markets within New Zealand. The primacy accorded to market forces in the present circumstances is subject only to the general prohibition on the improper use of a dominant position in a market contained in s 36 and the institution of price controls under Part IV which, as the Privy Council observed in *Telecom Corporation of New Zealand Ltd v. Clear Communications Ltd* [1995] 1 NZLR 385 at p. 404, is specifically directed to the regulation of prices in markets which are not fully competitive. Section 36(1) provides:
>
> > 36. Use of dominant position in a market - (1) No person who has a dominant position in a market shall use that position for the purpose of:
> >
> > (a) Restricting the entry of any person into that or any other market; or
> >
> > (b) Preventing or deterring any person from engaging in competitive conduct in that or in any other market; or
> >
> > (c) Eliminating any person from that or any other market.

**[42]** It is pertinent to note that the object of both the New Zealand Commerce Act 1986 and the Competition Act 2010 is to promote competition in the market. Subsections 10(1) and (2) of the Competition Act are relevant and they provide as follows:

> 10(1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.
>
> (2) Without prejudice to the generality of subsection (1), an abuse of a dominant position may include:
>
> (a) directly or indirectly imposing unfair purchase or selling price or other unfair trading condition on any supplier or customer;
>
> (b) limiting or controlling:
>
> (i) production;
>
> (ii) market outlets or market access;

**[43]** The word "enterprise" and the phrase "dominant position" are given the following meanings by s. 2:

> "enterprise" means any entity carrying on commercial activities relating to goods or services, and for the purposes of this Act, a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market.
>
> "dominant position" means a situation in which one or more enterprises possess such significant power in the market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.

**[44]** What amounts to abuse of dominant position includes those acts that are specified in paras. (a) and (b) of sub-s. 10(2). Of relevance to note in relation to the issue before us is that the Competition Act does provide for an avenue for complaint against any infringement of any prohibition or the commission of any offence under the Act and this is provided by s. 15(1) which reads:

> The Commission may, upon a complaint by a person, conduct an investigation on any enterprise, agreement or conduct that has infringed or is infringing any prohibition under this Act or against any person who has committed or is committing any offence under this Act.

**[45]** To directly or indirectly impose unfair selling price or other unfair trading condition on any supplier or customer is an abuse of dominant position within the meaning of s. 10(1) of the Competition Act and is prohibited. We do not think it can be disputed that by having monopoly of the ferry service between Menumbok and Labuan, Labuan Ferry was in a dominant position within the meaning of s. 2 of the Competition Act.

**[46]** It was Labuan Ferry's submission that since the respondents' claim relates to an alleged abuse of dominant position by the appellant, their claim must be decided within the context of the Competition Act, specifically s. 10(1) and not on any common law doctrine.

**[47]** It was urged upon us that once it is determined that the common law doctrine of prime necessity does not apply to Malaysia, the respondents' claim premised as it was on this doctrine must fall *in limine* and the contract for usage of the ferry service between Labuan Ferry and the respondents would then be governed by the Contracts Act and regulated by the Competition Act. Learned counsel did not however address us on the relevance of the Merchant Shipping Ordinance to the issue.

**[48]** We were referred to s. 64(1) of the Competition Act which provides for the right of private action. It stipulates as follows:

> Any person who suffers loss or damage directly as a result of an infringement of any prohibition under Part II shall have a right of action for relief in civil proceedings in a court under this section against any enterprise which is or which has at the material time been a party to such infringement.

**[49]** Labuan Ferry's submission in this regard was that the respondents' cause of action should have been filed pursuant to this provision, and since it was not, the court ought not to make a decision under the provision in respect of the respondents' claim. This according to learned counsel is because any infringement of the provisions of the Competition Act falls under the purview of s. 64(1) and ought therefore to be decided in accordance with the Competition Act. It was submitted that the respondents need to prove their claim under the Competition Act in a new action and Labuan Ferry is entitled to defend the claim.

**Our Decision On Applicability Of Doctrine Of Prime Necessity**

**[50]** What we can gather from counsel's argument is that while Labuan Ferry accepts that the respondents indeed have a civil cause of action against Labuan Ferry for increasing the ferry charges and for refusing to allow them to use the ferry service, the action should have been filed in accordance with the provisions of the Competition Act and not under the Rules of Court 2012 and relying on the common law doctrine of prime necessity to establish liability.

**[51]** The complaint is therefore directed more at the mode of proceeding adopted by the respondents rather than at the principle of law that is applicable to the factual matrix of the case, which is the application of the common law doctrine of prime necessity *vis-à-vis* Labuan Ferry's act of increasing the ferry charges and in refusing to allow the respondents to use the ferry service.

**[52]** We have pondered over the point raised by learned counsel. In our view, the mere existence of the Competition Act, the Contracts Act and the Merchant Shipping Ordinance is not key to determining whether the common law doctrine of prime necessity applies in Malaysia. The key to determining the issue is whether the three statutes encapsulate the common law doctrine of prime necessity.

**[53]** If they do, then learned counsel is right in saying that the doctrine has no application in Malaysia for then it will be excluded by s. 3(1) of the Civil Law Act. Liability would then have to be determined by applying the provisions of any or all of these statutes and not the common law doctrine of prime necessity.

**[54]** However, if the three statutes or, for that matter, any other statute in force in Malaysia are not statutes that deal with and encapsulate the common law doctrine of prime necessity as laid down in *Allnutt*, which was the law as administered or in force in England on the dates specified in s. 3(1)(a), (b), (c) of the Civil Law Act, then the common law doctrine "shall" be applied in Malaysia, subject to such qualifications as local circumstances render necessary.

**[55]** We must hasten to add however that before applying the common law doctrine in Malaysia, it must first be determined that the service provided is an essential service. In the context of the present case, it must first be determined that the ferry service provided by Labuan Ferry was an essential service. If it was, then it would be a service of prime necessity and Labuan Ferry who had a monopoly over the service would have an implied obligation to provide the service in consideration for a fair and reasonable payment: *Minister of Justice of the Dominion of Canada (supra)*.

**[56]** In the words of *Allnutt*, "if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms". The doctrine therefore makes it obligatory for monopoly suppliers of essential products and services to provide the products and services on reasonable terms. What the reasonable terms are must in our view depend on the facts and circumstances of each case.

**[57]** It is important to appreciate that the Competition Act, the Contracts Act and the Merchant Shipping Ordinance do not contain provisions that regulate the monopoly of essential services such as the ferry service provided by Labuan Ferry to the general public in Sabah and Labuan. These statutes are therefore not "other provision has been made or may hereafter be made by any written law in force in Malaysia" within the meaning of s. 3(1) of the Civil Law Act. As such, they do not have the effect of excluding the application of the common law doctrine of prime necessity.

**[58]** The Competition Act in particular is an Act whose prime object is to promote and protect the process of competition. We reproduce below the three paragraph long title to the Act:

> An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith.
>
> WHEREAS the process of competition encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality of products and services and wider choices for consumers:
>
> AND WHEREAS in order to achieve these benefits, it is the purpose of this legislation to prohibit anti-competitive conduct:

**[59]** It is plain and obvious that the object underlying the Competition Act is to protect the interests of consumers by prohibiting anti-competitive conduct. It is meant to regulate conduct among competitors, as the title to the Act suggests. It is not meant to regulate monopolies of essential products or services. Most importantly the Act does not prohibit monopolies, nor does it regulate them.

**[60]** An enterprise that is in a "dominant position" within the meaning of s. 10(1) of the Act is not to be equated with a monopoly, which involves no competition at all to begin with. This takes the monopoly of essential products or services outside the purview of the Act.

**[61]** Therefore, the Competition Act, which is aimed at regulating conduct among competitors, has nothing to do with the common law doctrine of prime necessity which, we must reiterate, is concerned with the obligation by monopoly suppliers of essential products and services to supply the products and services in consideration for fair and reasonable payments, and not with the process of competition.

**[62]** The ferry service between Menumbok and Labuan which Labuan Ferry monopolised was clearly an essential service and is therefore subject to the common law doctrine of prime necessity and not to the provisions of the Competition Act.

**[63]** As for the proviso to s. 3(1) of the Civil Law Act, we see no reason why the circumstances of the State of Sabah and the Federal Territory of Labuan and their inhabitants would not allow for the application of the doctrine, which in pith and substance is a doctrine of universal application to ensure that no person will suffer economic loss at the hands of monopoly providers of essential services like Labuan Ferry who flex their muscles to the detriment of those who have no choice but to use their services. It comes as no surprise that the doctrine has withstood the test of time since its inception in 1810.

**[64]** Being vested with monopoly of a public privilege, Labuan Ferry had no right to impose unreasonable charges for the ferry service, let alone to withhold the service completely from the respondents in the absence of good cause. There is presently no statute in Malaysia that we are aware of that deals with the cause of action of the nature filed by the respondents. Resort must therefore be had to the common law doctrine of prime necessity.

**[65]** For the reasons aforesaid, we agree with the learned trial judge that on the facts and circumstances of the case, there is no reason why the English common law doctrine of prime necessity should not or is not applicable or cannot form part of the common law of this country.

**[66]** That disposes of the issue of whether the common law doctrine of prime necessity applies in Malaysia on the facts and circumstances of the case. As for the merits of the appeal by Labuan Ferry, we have mentioned earlier that in finding liability against Labuan Ferry, the learned trial judge had adequately dealt with the evidence before him and we are not prepared to depart from his decision, which as we said was primarily based on findings of fact.

**[67]** If at all we have anything to add, it is to hold the view that the increased fares imposed by Labuan Ferry was excessive and unreasonable in all the circumstances of the case, given the fact that it had a monopoly over the ferry service between Menumbok and Labuan, which was essential to trade, commerce and transportation between Sabah and Labuan. The appeal by the appellant Labuan Ferry is therefore dismissed with costs of RM50,000 to the respondents in the first appeal.

**The Second Appeal**

**[68]** We shall now deal with the appeal by Chin Mui Kien (the second appeal). The crux of her complaint was that the learned trial judge did not at all proceed to assess or at the very least consider her claim for the loss of use of the two vehicles or for the loss of profit. It was submitted that the learned trial judge erred in failing to direct his mind to the appellant's pleaded prayer for damages to be assessed for such loss of use and loss of profit for the two vehicles. It was argued that the fact that the two vehicles were stranded in Labuan due to Labuan Ferry's refusal to issue ferry tickets meant that she had lost the use of the vehicles to earn income from her transportation business.

**[69]** In dismissing her prayer for assessment of damages, the learned trial judge amongst others held the view that the appellant should have hired a barge or other means of transportation to transport the two vehicles out of Labuan as soon as possible, in an obvious reference to the appellant's failure to mitigate her losses.

**[70]** Learned counsel however contended that this was an irrelevant consideration because the appellant's main trade was in the business of transporting her clients' goods between Menumbok and Labuan. By Labuan Ferry's refusal to sell tickets to her, she was prevented from using the two vehicles to earn income.

**[71]** Learned counsel referred us to three authorities in support of her argument. The first was *Krishnasamy Supramany v. Arab-Malaysian Finance Bhd* [2009] 2 CLJ 853; [2008] 3 MLRH 594 where it was held as follows:

> The Plaintiff is entitled to claim for loss of use in the form of general damages. Assessment of damages are based on the evidence adduced and to some extent, the damage may have been inferred or presumed (See *Heng Long Motor Trading Co v. Osman Abdullah* [1994] 2 MLRH 92).

**[72]** The second authority was *Champion Motors (1975) Sdn Bhd v. Tina Travel & Agencies Sdn Bhd* [1997] 1 CLJ Supp 111; [1996] 1 MLRH 320 where the Court of Appeal in affirming the High Court's decision held:

> At the trial, no receipt was produced by the plaintiff to support the claim for the reason that the receipt was misplaced after a period of ten years.
>
> The defendant at the trial did not offer any witness or document to rebut the facts and evidence so given by the plaintiff.
>
> On the balance of probability, the learned Judge found for the Plaintiff as claimed.
>
> Also, the appellant knew the purpose the plaintiff bought the said vehicle and the vehicle requires periodic inspection by the authorities and any particulars found at variance with the record kept by the authorities would cause injuries to the plaintiff as owner of the vehicle having bought it from the appellant. I accepted the submissions by the learned Counsel for the plaintiff and held that the loss suffered by the plaintiff is foreseeable and therefore, not too remote.

**[73]** The next authority was the Singapore case of *Singapore Bus Service (1978) Ltd v. Mohd Kamal Abas & Anor* [1996] 2 SLR 646 where it was held:

> The loss of use in respect of SBS316R should be calculated on the basis of its operational cost thrown away on account of it being detained during the repair period as this was the more consistent basis of calculation than the other method.
>
> A rough estimate of such cost, in the absence of evidence as to the actual operational cost, would be in the region of one-half of the average profit, which figure would include administration costs, insurance, depreciation, maintenance costs and capital investment.

**[74]** The last case cited was *Birmingham Corp v. Sowsbery* [1970] RTR 84. In that case, the corporation claimed general damages for the loss of use and the defendant conceded that it was reasonable and necessary for the corporation to maintain the spare fleet. The corporation was awarded

substantial general damages and it was held that the proper method of assessment of these damages was a calculation comprising the true daily standing charge cost multiplied by the number of days that the use of the omnibus was lost to the corporation.

**[75]** The appellant further submitted that it was wrong for the learned judge to dwell on the issue of lack of evidence produced by the appellant. What the learned judge should have done according to counsel was to order for assessment of damages before the Registrar of the High Court, which was what she prayed for in her pleadings.

**[76]** In opposing the appellant's appeal, learned counsel for Labuan Ferry relied entirely on the grounds of judgment of the learned judge which he submitted were clearly correct in accordance with established principles of law and based on evidence adduced at the trial. He submitted that the learned judge was right in finding that the conditions to found and substantiate a cause of action for the tort of inducing breach of contract was not fulfilled by the appellant, citing *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211; [1984] 2 MLJ 105.

**[77]** Having given careful consideration to the matter, we are constrained to agree with the appellant Chin Mui Kien that it was wrong for the learned trial judge to have dismissed her prayer for damages to be assessed on the ground that she produced no evidence to prove her claim. With due respect to the learned judge, since the appellant's prayer was for damages to be assessed, the proper course for him to take would have been to proceed with assessment of damages in order that the appellant could adduce evidence to prove the quantum of damages that she claims to have suffered.

**[78]** The question as to whether damages has been proved, and if so how much has been proved, should only be determined in an assessment proceeding upon proof of liability at the conclusion of the trial, which the appellant had in fact succeeded in the present appeal. In the circumstances, the appellant's appeal is allowed with costs of RM10,000. The matter is reverted to the High Court for assessment of damages by another judge of the High Court. Costs shall be costs in the cause.

**The Third Appeal**

**[79]** We now come to the third appeal by the appellant Wong Thiam Phin. The learned trial judge found that he had failed to prove, on the balance of probabilities, that Labuan Ferry knew of the Gold Coin contract and therefore intended to interfere with its performance. Whether Labuan Ferry had the requisite knowledge is a question of fact for the trial judge to determine.

**[80]** In this regard, the learned trial judge had meticulously dealt with the evidence produced before him and had rightly referred to *Tribune Investment Trust, Inc v. Soosan Trading Co Ltd* [2000] 3 SLR 405 for the proposition that the intention to interfere with the performance of a contract is to be determined objectively. His grounds can be found at pp. 60 to 69 of part A volume 1 of the record of appeal.

**[81]** Having regard to the evidence, the grounds of judgment and the arguments of the parties, we are not convinced that the learned trial judge had erred either in law or on the facts in dealing with the appellant's claim. As such, there is no justification for us to override his decision on liability. The appeal by Wong Thiam Phin is accordingly dismissed with costs of RM20,000.

**[82]** Both Chin Mui Kien and Wong Thiam Phin had also appealed against the learned judge's order on costs. Likewise, we do not find any justification to interfere with the order as it has not been shown that the learned judge had exercised his discretion wrongly: see *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] MLJ 228 where the Judicial Committee of the Privy Council held that the court will not interfere with the exercise of discretion unless it is satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice. Their appeals against the order on costs are dismissed.